STATE OF MICHIGAN

COURT OF APPEALS

HOBWEN, INC., and STAMPEDE MANAGEMENT, INC.,

Plaintiffs-Appellants,

v

SISBRO MANAGEMENT, L.L.C., and WT DEVELOPMENT CORPORATION,

Defendants-Appellees,

and

MILLER CANFIELD PADDOCK & STONE, P.L.C.,

Intervening Party-Appellee.

UNPUBLISHED
December 23, 2014

No. 317897
Oakland Circuit Court
LC No. 2010-108106-CK

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court order denying their request for attorney fees as sanctions under either MCL 600.2591 (frivolous defense) or MCR 2.114 (pleading signed for an improper purpose). We affirm.

Plaintiff Hobwen, Inc. owns property on which plaintiff Stampede Management, Inc. operates a Wendy's restaurant. Defendant Sisbro Management, L.L.C. owns the adjacent property. Defendant's property is subject to a use restriction that provides the property "shall not be used for a restaurant use, the primary business of which is the sale of hamburgers, hamburger products or chicken sandwiches (or any combination thereof)."[1] Defendant intended to build a

[1] The restriction provides that "a restaurant has the aforesaid products as its primary business if fifteen percent (15%) or more of its gross sales, exclusive of taxes, beverage and dairy product sales, consists of sales of hamburgers, hamburger products or chicken sandwiches (or any combination thereof)."

Taco Bell restaurant on its property. Plaintiffs instituted the instant litigation to enjoin defendant's construction of the restaurant on the basis that it would violate the use restriction.

The parties filed cross-motions for summary disposition. Plaintiffs argued that the use restriction precluded construction of a restaurant, the primary business of which included the sale of either hamburgers or "hamburger products," i.e., products with ground beef such as tacos, burritos, or similar items. Defendant argued that the use restriction only prohibited restaurants that sold various types of hamburgers and, therefore, would not prohibit a Taco Bell restaurant, which does not sell hamburgers. The trial court granted defendant's motion. It held that the term "hamburger products" was ambiguous and rejected plaintiffs' contention that the term was synonymous with "ground beef products." The court concluded that because the meaning of the term was not clear on its face and there was no commonly understood meaning of the term, it could not be enforced as written.

On appeal, this Court reversed the trial court's decision, concluding that "the term 'hamburger products' plainly means ground beef items that are produced or made or, stated another way, items made with ground beef." *Hobwen, Inc v Sisbro Mgt, LLC*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 302755), unpub op at 3. This Court remanded the case for a determination whether "defendant's intended restaurant's primary business 'consists of sales of . . . hamburger products,' i.e., ground beef items or items made with ground beef, as set forth in the use restriction . . . ." *Id*., unpub op at 4.

On remand, the parties reached a settlement, but reserved the issue of attorney fees. Plaintiffs subsequently filed a motion claiming entitlement to attorney fees under MCL 600.2591 and MCR 2.114. The trial court denied the motion and the instant appeal followed.

Plaintiffs argue that the trial court erred in denying their request for sanctions under MCL 600.2591 or MCR 2.114. A trial court's determination of whether a party or an attorney is liable for sanctions under MCR 2.114(D) is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A trial court's decision whether to award attorney fees under MCL 600.2591 is also reviewed for clear error. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). A decision is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Kitchen*, 465 Mich at 661-662.

MCL 600.2591 permits a trial court to impose sanctions if a party files a frivolous defense. See also MCR 2.114(F). A defense is frivolous within the meaning of the statute under the following circumstances:

> (*i*) The party's primary purpose in . . . asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> [MCL 600.2591(3)(a); see also MCR 2.114(D)(3).]

Whether a defense was frivolous is to be determined under an objective standard, and is evaluated by examining the facts and circumstances that existed at the time the defense was filed. See *In re Attorney Fees,* 233 Mich App at 702.

MCR 2.114(D) imposes an affirmative obligation on an attorney to conduct a reasonable inquiry into both the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case." *Id*. MCR 2.114(E) authorizes the court to impose sanctions if one of the requirements of MCR 2.114(D) is violated.

Plaintiffs argue that they are entitled to sanctions under MCL 600.2591(3)(*ii*), (3)(*iii*), or MCR 2.114(D)(2) because defendant's defenses were either based on facts that were not true, frivolous, and/or were devoid of arguable legal merit. We disagree.

The trial court did not clearly err in concluding that defendant did not assert a frivolous defense. Plaintiffs offered no evidence that defendant acted with a primary purpose of harassing, embarrassing, or injuring plaintiffs, or delaying the proceedings or needlessly increasing the cost of this litigation. Thus, sanctions were not warranted under MCL 600.2591(3)(*i*) or MCR 2.114(D)(3).

The trial court also did not err in finding that defendant's position was not devoid of legal merit or based on facts that were not true. The principal issue in this case involved the scope and intended meaning of the terms "hamburgers" and "hamburger products" in the use restriction. Plaintiffs' reliance on the deposition testimony of defendant's president and the testimony of the Wendy's employee who drafted the use restriction does not compel the conclusion that defendant's proffered interpretation of the disputed terms was frivolous. Neither the trial court, nor this Court in the prior appeal, found that these witnesses' interpretations or understanding of the disputed terms were dispositive. Similarly, defendant's reliance on the United States Department of Agriculture's definitions of "ground beef" and "hamburger" did not render its defense frivolous. Defendant did not rely exclusively on the USDA definitions, but rather employed them as additional support for its position regarding the intended meaning of the disputed terms. This Court's characterization of the USDA definitions as "technical" in nature and conclusion that they must give way to the common or plain meanings of the terms, *Hobwen, Inc*, unpub op at 4, does not render defendant's attempt to advance those definitions wholly without legal or factual merit, particularly when the trial court observed that there were multiple definitions of the terms. We also reject plaintiffs' claim that defendant made a frivolous argument when it contended that the term "hamburger products" was ambiguous without attempting to define the term itself. It was not unreasonable for defendant to argue that, to the extent it was ambiguous, the term should be construed in favor of the free use of the property and against plaintiffs, the parties seeking to enforce the use restriction. See *Colony Park Ass'n v Dugas*, 44 Mich App 467, 468; 205 NW2d 234 (1973).

The interpretation of the disputed terms had also not been subject to previous litigation. Defendant's position that the terms should be construed as synonymous with the hamburger products sold by plaintiffs' restaurant, and should not be construed as synonymous with dissimilar Taco Bell products merely because they were made with ground beef, was not devoid

of factual or legal merit. Indeed, the trial court acknowledged that the issue involved a "difficult" question and originally ruled in favor of defendant. As the trial court appropriately observed, the fact that plaintiffs ultimately prevailed on appeal does not mean that defendant acted frivolously by advocating its position. *Kitchen*, 465 Mich at 663.

Accordingly, we conclude that the trial court did not err by denying plaintiffs' requests for attorney fees.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen Fort Hood
/s/ Douglas B. Shapiro